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AUTHOR Baldwin, Grover H.
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ABSTRACT

A review of good faith requirements under meet and confer laws for public sector negotiations raises implications for school district management decisions regarding negotiations. First, it appears that state courts are being influenced by National Labor Relations Board and federal court rulings that pertain to the private sector, causing private sector negotiating strategies and reasoning to be applied to public sector negotiations. Second, the rulings that apply National Labor Relations Act provisions to public schools require boards to make every effort to reach an agreement with the employees' union. Anything that gives the appearance of surface bargaining, or merely going through the motions to satisfy the statutory requirements so that the boards can reach impasse and make unilateral changes, will be suspect and challenged and may well lead to a finding of bad-faith negotiations. Third, private and public sector rulings have expanded good faith rulings to include the need to provide information to substantiate proposals, counterproposals, and claims by management, as well as to provide information to employee representatives to permit the fulfillment of responsibilities to administer and police the contract. On balance, the efforts by the courts to provide the atmosphere for good faith negotiations via application of private sector standards to the public sector is a trend worth watching for those who negotiate in this arena. (MLF)

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The Implications of "Good-Faith" Negotiation Provisions for "Meet and Confer" Laws

Grover H. Baldwin

In 1979, the Kansas Supreme Court ruled that a school board could issue unilateral contracts to the professional staff of the district which included an unnegotiated item that directly affected individual employees. This item was the payment of a fee by any teacher who sought to be released from his contract. This fee was considered to be for liquidated damages. While the item had been a policy of the board as a $200 payment, it was now raised to $500 and was included in the contract. The court held that as negotiations had been completed in accordance with the statute, and as the impasse could not be resolved, the board could take such action unilaterally in the best interests of both the public and the employees[1].

While the issue the court decided was the inclusion of new items in a unilateral contract which had been unaccounted for in the collective bargaining process, the ruling raises questions about the good faith obligation of parties in that process. This is the central issue raised in this paper: What is the good faith requirement within meet and confer laws that must be met in order to satisfy the statutes and yet act in the best interest of the public and the employees? This issue is important; the answer can serve as a guide to school boards in their efforts to meet the statutory requirements of good faith negotiations. As state courts have come to rely on NLRB and appellate court rulings in rendering their local decisions, we will examine the common law to discern these requirements.

The Duty to Bargain

Good faith is an elusive term. It is difficult to define with any degree of accuracy as subjective judgment is used when trying to determine whether an individual, or board, acts in good faith in fulfilling its obligations. For boards of education or private com-

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1. Riley County Educ. Ass'n. v. Unified School Dist. No. 378, 592 P.2d. 87 Kan. (1979).

panies, the courts and the NLRB have ruled that mere words, and in some cases actions, are not enough to insure the fulfillment of the responsibility for good faith in the collective negotiations process. On that basis, tests of the viability of the good faith of both parties have been established. These include the differences between surface, hard, reasonable bargaining in maintaining negotiations positions; the use of information as part of the process, the withdrawal of tentatively accepted proposals; and the determination and effects of impasse on unilateral changes.

The Supreme Court, in dealing with the question of tests of good faith, stated

> (the) performance of the duty to bargain requires more than a willingness to enter ... The duty to bargain collectively, implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by the explanation of the purpose and meaning of the phrase "bargain collectively in a good faith effort to reach an agreement." This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the NLRB and the Courts of Appeal.[2]

We first turn to the issue of the bargaining strategies used by parties in collective negotiations. These fall into three distinctly different, yet entwined, categories which include surface bargaining, hard bargaining, and reasonable bargaining. While surface bargaining appears to be hard bargaining, it is a sham that provides an opportunity for either side to merely follow the process and move to the next stage in negotiations until impasse is declared. By going through the motions, the formal obligations are fulfilled, but without agreement and a settled contract. The effect is to weaken the collective negotiations process by weighting the balance in favor of one party, typically management.[3]

The Ninth Circuit examined these realities and found that surface bargaining can look so much like hard bargaining that it is difficult to detect surface bargaining.[4] In examining the claim of bad-faith negotiations, the Fifth Circuit held that while employers need not make concessions, or yield on positions merely to reach an agreement, bad faith is prohibited even where done with sophistication and finesse. It takes more than mere "surface bargaining" or "shadow boxing to a draw", or "giving the Union the runaround while purporting to be

2. NLRB v. American Nat'l. Ins. Co., 343 U.S. 395, 402-403 (1952).
3. Cox, *Duty to Bargain*, 71 Harv. L. Rev. 1401-1442, (1958).
4. Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403 (9th Cir. 1977).

meeting with the Union for purpose of collective bargaining."[5] The use of surface bargaining is difficult, but not impossible, to detect. Delay in bargaining sessions, withdrawal of proposals tentatively agreed upon, meager offers of counterproposals, and offers that may lead to the ineffectiveness of the union, or abrogation of its responsibilities, are all items that have been held to be indications of surface bargaining. Likewise, tactics that include sending representatives with no authority to bargain and breaking commitments made at the table are evidence of a lack of good faith.[6]

The NLRB and the courts have steadfastly ruled that hard bargaining, the insistence of a position on the part of one party for justifiable reasons, is a legitimate part of the negotiating process and is not to be confused with surface bargaining. The courts have held that the determination of whether the bargaining process is impermissible surface bargaining or permissible hard bargaining involves an examination of each negotiating situation based on a complete set of facts which are open to various, and different, interpretations.[7]

The Fifth Circuit held that insistence on a particular bargaining position well founded and sincerely held, and not mere "window dressing," is not in itself a refusal to bargain in good faith.[8] The issue, in this case, was the insistence on the part of the employer to a management rights clause, which, when combined with no-strike and no arbitration clauses, lead to an allegation of unfair labor practice within the scope of good faith negotiations. The union had made various concessions throughout the negotiating process, while management had not moved from its initial position. The court held that the company did not have to move even when the other side made concessions in the hope that the company would follow suit. The court ruled that the company could adopt this tactic as management had demonstrated that it sincerely believed in its position. In this particular case, the insistence of management on its position was supported by evidence of its deep held conviction, and was not a whimsical idea on its part.

While the management position may be strong, and while it appears to be intransigent and possibly in bad faith, the ultimate test applied by the courts in reviewing the NLRB rulings has been the disposition and posture of both parties as they face the process of

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5. NLRB v. Herman Sausage, 275 F.2d 229 (5th Cir. 1960).

6. NLRB v. A. E. Nettleson, Co., 241 F.2d 130 (2d Cir. 1957); NLRB v. Shannon, 208 F.2d 545 (9th Cir. 1953); and NLRB v. National Shoes, Inc., 208 F.2d 688 (9th Cir. 1953).

7. Seattle-First National Bank v. NLRB, 638 F.2d 1221 (9th Cir. 1981).

8. Chevron Oil Co., Standard Oil Co. of Texas Div. v. NLRB, 442 F.2d 1067 (5th Cir. 1971).

reaching the final agreement. This posture presupposes that neither side will adopt and maintain a position of "take it or leave it" that would be detrimental to the negotiating process. The intention of the NLRA was to permit open and fair-minded attempts at reaching a settlement and maintaining the harmonious aspects of industrial peace. This could be accomplished only via honest and good faith collective bargaining.[9]

The courts look askance at unilateral actions of the employer following the impasse declaration that may signal a lack of good faith. Of note is the *NLRB v. Katz* decision, where management's proposal called for a three-year contract with a $7.50 per week increase followed by additional increases of $5 a week at the end of the first and second years of the agreement.[10] Following the rejection of the offer by the union, the company unilaterally announced a new system of automatic wage increases which included a $5 raise every three weeks up to a stipulated ceiling, a $5 raise every six months for employees earning between $75 and $90 per week, and a merit review every six months for employees earning over $90 per week. The court held that this was a violation of good faith provisions as the wage system the company put in place unilaterally was more generous than had been offered to, and rejected by, the union. The court further indicated that, while the employer need not lead with the best offer, management has no right, following the conclusion of unsuccessful negotiations, to grant increases larger than were offered at the bargaining table as it is necessarily inconsistent with the sincere desire to conclude an agreement with the union and would be indicative of surface bargaining.

The question still arises of whether a position may be so intransigent as to appear to be a hard bargaining position, and yet be that of surface bargaining. What determines the difference? Part of the answer lies in the actual offer of management and the reasonableness of that offer in light of current economic and social surroundings. For instance, in *K-Mart Corp. v. NLRB,* the Ninth Circuit held that the company had violated good faith by offering a contract with a meager pay package.[11] By offering this proposal in a period of double-digit inflation and, after a great deal of time and delay, the effect was to offer no real wage increase. Rather, the offer, according to the court, could be interpreted as a wage decrease. The conclusion of the court was that this type of offer was indication enough that the company had not negotiated seriously, and hence not in good faith.

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9. NLRB v. Insurance Agents Int'l. Union, 361 U.S. 395 (1952).
10. NLRB v. Katz, 369 U.S. 736 (1962).
11. K-Mart Corp. v. NLRB, 626 F.2d 704 (9th Cir. 1980).

Meager offers, or offers that are patently disadvantageous to the union, are evidence of a lack of good faith bargaining on the part of management. While hard bargaining does not preclude the insistence of a singular position that can be supported by evidence, the courts have held that maintenance of positions that indicate less than good faith will not be tolerated. In *NLRB v. Blevins Popcorn Co.*, the court found that a company that insists on terms which "no self-respecting union" could accept, is not fulfilling its obligation to bargain in good faith.[12] Such a bargaining position may include a proposal, or set of proposals, that the other side may find unacceptable, but may not clearly show an intent on the part of management to enter a contract only on its terms.[13]

The Ninth Circuit examined the hard bargaining positions of management when a strong management rights package was demanded by the employer.[14] Even though supported by evidence of economic justification the court found that the proposal worked to the detriment of the union and forced the union to abrogate its rights as representative of the employees. Such a proposal, even when management presented evidence to support its proposal, was found to be inconsistent with the obligation to bargain in good faith.

Information and Negotiations

The apparent key to success in determining hard or reasonable bargaining from surface bargaining flows from the ability of the management team to demonstrate its willingness to negotiate, explain, and support its position in such a manner as to support its claims of negotiations in good faith.[15] Part of this success is through the sharing of information with the other side. This information takes two forms. First, there is the information needed to successfully complete negotiations and permit reasonableness on the union side in preparing its proposals. Second, there is the information offered by management in support of its contentions and proposals. Of the two types of information, the courts have held that the second is more important in determining the good faith intentions of the management.

The premier case for this issue is the *NLRB v. Truitt Manufacturing Co.*[16] The question before the court was whether the company

12. NLRB v. Blevins Popcorn Co., 659 F.2d 1173 (D.C. Cir 1981).
13. Pease Co. v. NLRB, 666 F.2d 1044 (6th Cir. 1981), *cert. denied*, 456 U.S. 974 (1981).
14. NLRB v. Mar-Len Cabinet, Inc., 659 F.2d 995 (9th Cir. 1981).
15. Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956 (9th Cir. 1981).
16. NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

had bargained in good faith when it presented a modest proposal for wage increases. The company stated it could not afford additional wage increases due to economic reasons, but refused to meet union requests to produce information and evidence to substantiate its claims. The union insisted that such information was vital and pertinent to the process to determine whether or not the union should continue to press for its wage demands, or whether they should be modified in light of the financial standing and profits of Truitt. The company steadfastly refused to comply with the requests, stating that the information was not pertinent and that union had no right to it.

The NLRB ruled that the information was relevant to the negotiating process and that the company needed to provide reasonable proof of its claims. The Supreme Court held for the NLRB, indicating that, while the Congress did not intend for the NLRA to compel agreement, it did require bargaining in the hope of concluding an agreement and required both parties to make every reasonable effort to reach that agreement. The Court indicated that each case involving the demand for disclosure of proof to substantiate the bargaining position must be examined on a case-by-case basis to determine the specific circumstances under which the demand for information relevant to the bargaining process had been met or not.

Truitt thus becomes a standard for the determination of good faith negotiations where information is concerned. The courts of appeal have dealt with the information issue and have used the *Truitt* decision to formulate additional requirements regarding the providing of information by management to the employee representatives for good faith negotiations.

In *NLRB v. Western Wirebound Box Co.* the company abandoned its position that a cut in wages was needed (though unsubstantiated) in adopting a position that provided for continuing wages at the current level and even providing for a small increase.[17] The company claimed that the wage cut, or lack of increase, was needed to permit it to remain in existence and not operate at a loss or threaten its existence. The union requested information only regarding the productivity and production costs of the company. The court, relying on *Truitt*, indicated that an employer who insists that competitive disadvantage does not allow him to give in to a union wage demand, has to substantiate that claim. The court went further and indicated that failure to produce supporting data constituted a failure of good faith negotiations unless (1) the union made no request for such data or (2)

17. NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966).

such data could not be supplied. Further, the court stated that

> the duty to substantiate a claim upon request, established by *Truitt*, is not to be defeated because the union fails to ask for the precise kind of information which is relevant to the claim, or because the company, although capable of supplying relevant information, is unable to supply other relevant or irrelevant data specifically requested by the union.[18]

The Supreme Court further examined the posture of collective negotiations in the *Acme Industrial* case.[19] It found that good faith negotiations demands that both sides be willing to do whatever is reasonable to reach an agreement, and that artificial barriers should not be constructed. Thus, the need for information, upon request by the union, is a part of the negotiating process. This information may be either of a precise nature to substantiate specific claims, or of a general nature that can be used to derive the status of the management's position relevant to the claims involved in proposals and counterproposals.

The need to pursue the request for information became an issue in *Pacific Grinding Wheel Co.* where the Ninth Circuit held that, if the union never pursued the claim for such information, the company had not violated good faith efforts.[20] While the company needed to provide relevant information, the court also declared that it was incumbent upon the union to ask for such information. Failure to request such information, and the company's failure to produce it, was not to be used as a basis for an allegation of bad faith.

The Ninth Circuit went further in delineating the bounds of company refusal to grant a request for information. In *NLRB v. Associated General Contractors* the court held that, while the duty to bargain in good faith may be violated by the employer's refusal to grant information to the union, the company may withhold such information if there are good reasons for nondisclosure.[21] These reasons included some indication that there was a need for secrecy of production costs and financial information as it may affect the company's status in the overall economic environment in which it operated.

Lastly, in dealing with the need for information regarding proposals and counterproposals of either side, the First Circuit set a liberal discovery-type standard.[22] In *Soule Glass and Glazing Co. v. NLRB,*

18. *Id.* at 92.
19. NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).
20. Pacific Grinding Wheel Co. v. NLRB, 572 F.2d 1343 (9th Cir. 1978).
21. NLRB v. Associated Gen. Contractors, 633 F.2d 766 (9th Cir. 1980).
22. Soule Glass and Glazing Co. v. NLRB, 632 F.2d 1055 (1st Cir. 1981).

it was held that:

> Where the requested information concerns wages and related information for employees in the bargaining unit, the information is presumptively relevant to the bargainable issues . . . and unless the employer comes forward with an effective rebuttal as to the lack of relevance or provide(s) adequate reasons why he cannot, in good faith, supply the information, . . . the union need make no showing of relevance.[23]

However, this discovery-type procedure does have some safeguards for the employer. Employer positions for nonsubmission of information may be based on the claim of justifiable fear of violence or harassment of employees. However, information about employees outside the bargaining units including data regarding profits, production figures, wage surveys of competitors, and the like, may also be requested. In the latter instances, the union must show the need for such evidence based on the relevance of the information to its preparation of negotiating proposals and substantiation of its claims.

Proposals and Impasse

Several issues are raised under this area applicable to good faith negotiations, including (1) the withdrawal of proposals which are tentatively accepted by both sides, (2) the duration that a proposal is in effect, as well as (3) the impact of the proposal's status at impasse.

While it has been held that the withdrawal of a proposal tentatively accepted is an unfair labor practice and evidence of a lack of good faith within the collective bargaining process, the courts are prone to look at the conditions under which the proposal was withdrawn, prior to declaring a lack of good faith.[24]

The use of the "good faith" reasoning on the part of the Eleventh Circuit provides evidence of the court's willingness to permit the withdrawal of a tentatively accepted proposal.[25] Here the company withdrew a proposal which led to the allegation of bad faith negotiations. The union had tentatively agreed upon the proposal as part of the negotiations package and the company rescinded the offer. The court found that the withdrawal of proposals or tentative agreements does not in and of itself, establish bad faith negotiations. However, there must be a good cause or it will be evidence of a lack of good

23. *Id.* at 1093.
24. American Seating of Mississippi v. NLRB, 424 F.2d 106 (5th Cir. 1970).
25. The Mead Corp. v. NLRB, 697 F.2d 1013 (11th Cir. 1983).

faith bargaining. The court also sustained the withdrawal of proposals prior to final total acceptance of the negotiated agreement where concessions have been made on other issues that warrant a change in previously accepted proposals. However, it should be noted that these conditions are based on the mutual agreement of both parties.

Yet, how long does an offer stand in negotiations? In examining the issue of whether an unconditional offer remains open to acceptance after the other party has rejected the offer or submitted a counterproposal, the Eighth Circuit held that the proposal remained open to acceptance even after rejection by the union.[26] The court held that, even where the original offer had been rejected, where a strike had ensued, a condition of impasse had existed, the union accepted the initial offer to resolve the impasse condition, and the company reneged — claiming that the union's rejection had canceled the offer — the company was in violation of good faith negotiations.

The court held that the common law practice of negating a proposal through either rejection or counteroffer did not hold true in collective bargaining. There is a give and take in collective negotiations that must be kept. Thus, the court indicated that there was no expressed time limit for the acceptance or rejection of the proposal that would permit the company to withdraw the proposal. This time frame could have been made part of the proposal. Such a requirement was not made here and thus there was a lack of good faith. While the court did agree with the NLRB policy that the proposal may be accepted within a reasonable time period, it held that, unless the offer was made contingent upon some conditions subsequent to the offer or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain, the proposal stood in good stead unless expressly withdrawn.

The Ninth Circuit found that impasse might be a good cause under which a proposal could be considered withdrawn.[27] However, if no impasse existed, then the company's unilateral withdrawal of its last wage offer was an independent action, violative of its duty to bargain. In addition, the court examined the issue of the timing of changes in negotiations and saw that this was all important in considering good faith procedures. In this case, while the proposal was withdrawn and the company turned to a more regressive wage proposal, the court found that in an of itself such changes were not evidence of bad faith as long as a hard bargaining position had been maintained throughout negotiations. However, if the changes were a reaction to a strike

26. Pepsi-Cola Bottling Co. of Mason City, Iowa v. NLRB, 659 F.2d 87 (8th Cir. 1981).

27. Pacific Grinding Wheel Co. v. NLRB, 572 F.2d 1343 (9th Cir. 1978).

by employees, a union rejection to a company proposal, a lowering of the proposal, or raising issues not contemplated before the impasse occurred, such would be evidence of bad faith.

The effect that impasse has on the good faith practices of both parties is found in a series of cases that seek to define the responsibilities of both parties in the proposal and counterproposal stage, and the issuance of unilateral changes in employment conditions.

In *Katz*, the Supreme Court ruled that unilateral changes in the conditions of employment under negotiation was a violation of good faith portion under the NLRA as it circumvents the duty to negotiate in a responsible fashion. Subsequent rulings by circuit courts have provided a loosening of that test. In *American Federation of Television and Radio Artists v. NLRB*, while recognizing the duty to bargain in good faith and not make unilateral changes while in the process of negotiating, the court upheld the NLRB principle that, upon reaching impasse, an employer can make changes unilaterally that are reasonably tied to pre-impasse offers.[28] The question remains, when do the parties have to reach a stage of impasse?

To answer this question, we turn to the Fifth Circuit ruling in the *Gulf States* case.[29] In *Gulf States*, the court held that an impasse exists that makes further discussion futile. However, the court also observed that an impasse is broken by any action that can bring about fruitful discussion, even if no agreement is reached. Such indications of possibility include additional bargaining concessions, even after impasse procedures have been complete, and the passage of time. That impasse exists within the context of labor negotiations is a real possibility. The efforts of the NLRB and the courts have been to discern the sincerity of the impasse, the justification of the positions of the parties involved, and finally, the contents of the unilateral contracts issued by the employer in hopes of overcoming the impasse and returning to normal business operations for possible good faith violations.

The recognition and declaration of impasse are crucial to the actions of employers in the establishment of unilateral contract provisions. If, after a finding of good faith, the indication is that impasse has been reached, then such changes of proposals might be warranted. Further, the nature of the unilateral provisions is not fixed. Some courts have determined that the employer may go beyond the last proposal and unilaterally include items not previously considered. Other courts have ruled that the nature of unilateral decisions fol-

28. American Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

29. Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1980).

lowing impasse must be limited to no more than the proposals that existed at the time of impasse or such action will be considered a violation of good faith.

Even at that, the courts have examined the changes for the unilateral imposition of mandatory subjects versus permissive subjects. Where bargaining issues are mandatory, the courts sustain the union's position of unfair labor practice or negotiating in bad faith. Within the context of permissive items, however, the courts permit such unilateral changes even if not discussed or negotiated prior to the impasse.[30]

As stated at the outset, the measurement of good faith intentions on the part of either party is a difficult thing to assess. To determine the real intentions of either side in the collective negotiating process calls upon the NLRB and the courts to make subjective judgments as to the nature and extent of the parties' true beliefs and desires. Given the conditions outlined above used as tests for good faith and the need for an open mind and sincere desire to reach agreement, what are the implications for those in public sector negotiations who meet and confer on mandatory issues regarding wages, hours, and terms and conditions of employment for public school personnel?

The Schools and Good Faith Negotiations

Public sector negotiation laws range from permitting a teacher to approach the board with requests to hard bargaining laws with the right to strike as a legal economic weapon. Nevertheless, these laws are not directly tied to the NLRA and the decisions of the NLRB in administering the Act. Most states have fashioned their public sector negotiations laws loosely after the NLRA, even those utilizing "meet and confer" principles. The link between the NLRA, NLRB rulings, and federal court decisions then is the willingness of the state appellate courts to apply these findings in support of their own rulings.

Such applications appear to be best stated in the recent *Cumberland Valley School District* case.[31] During the process of negotiations the contract of the preceding year had expired and the district stopped payment of medical, hospitalization, and life insurance premiums, as well as certain tuition reimbursement costs, all of which had been provided under the expired contract. The Pennsylvania Supreme Court held that the district violated good faith bargaining because fringe benefits were wages as defined under the law and could not be unilaterally withdrawn. The court found that this uni-

30. Newspaper Printing Co. v. NLRB, 692 F.2d 615 (6th Cir. 1982).
31. *In re* Cumberland Valley School Dist. 394 A.2d 946 (Pa. 1978).

lateral change by the district was a coercive effort to force a settlement on the association. More instructive was the rationale of the court regarding the use of federal court rulings in rendering its decision. The court stated

> Section 701 of Act 195 which defines collective bargaining is substantially identical to section 151 of the NLRA. In the past, when a provision of Act 195 is similar to the NLRA, we (the judges) have looked to federal decisions for guidance.[32]

The court then relied on the *Katz* decision to find that the district had overstepped its bounds in the unilateral changes and had not acted in good faith.

The issue of good faith negotiations, and the concomitant responsibility to make proposals and counterproposals but not concessions, was further dealt with in Massachusetts. Relying on the decisions found in *Insurance Agents, Truitt,* and *Pittsburgh-Des Moines,* the Massachusetts court held that the duty to bargain includes the need to meet and negotiate and to do so in good faith.[33] Good faith for the court was a condition which includes an open and fair mind and a sincere effort to reach a common ground. Further, the court held that there can be no unilateral action on the part of the school board on matters that are mandatorily negotiable where there is no impasse, and no impasse can exist where it has been shown that the impasse is due to the failure on the part of one of the parties to negotiate in good faith.

Other states have examined the responsibilities of both parties in public sector negotiations to meet the responsibility of bargaining in good faith. The need for good faith negotiations, and the failure through good faith efforts to reach an agreement, is paramount in declaring that an impasse exists which will permit the district to unilaterally change conditions of employment. In *Board of Education v. Hawaii Public Employment Relations Board,* the Supreme Court of Hawaii found that both sides, by statute, had to negotiate in good faith.[34] Further the court noted that:

> In our opinion the law on collective bargaining in public employment, without ambiguity, clearly requires both the public employer and the exclusive representative of the public employees to

32. *Id.* at 950.
33. School Comm. of Newton v. Labor Rels. Comm'n., 447 N.E.2d 1201 (Mass. 1983).
34. Board of Educ. v. Hawaii Pub. Employment Rels. Bd., 528 P.2d 809 (Hawaii 1974).

> bargain (negotiate) collectively in good faith. . . . Thus, the proper construction . . . is that "impasse" means failure of a public employer and the exclusive representative to achieve agreement in the course of good faith negotiations (bargaining).[35]

This decision parallels the *Pacific Grinding Wheel* decision reviewed above.

While the Hawaii decision dealt with a statute that permitted strikes by teachers for economic pressure to balance the power of the two sides, the issue of good faith negotiations has also been raised within the specter of "meet and confer" laws, where there is a lack of balance of power between the two parties. The question arose in *NEA-Shawnee Mission v. Board of Education* about the meaning of "meet and confer" as compared to "negotiate" or "bargain."[36] The school board claimed that the law specified "meet and confer" which permitted it to seek advice, but permitted it to render a decision that it desired. The association claimed that "meet and confer," within the context of the law that included the effort to reach an agreement in good faith, meant more than merely having input in the decision making process.

The Kansas Supreme Court ruled in favor of the association on this issue and cast the term "meet and confer" in the same light, and with the same responsibilities, as the NLRA requirement to collectively bargain in good faith. In addition, the court held that the agreement reached, once ratified as required by the statute, becomes binding on both parties for the duration of the contract, and is more than a mere memorandum of understanding that the board may choose to follow. Thus, state courts are prone to follow the lead of federal courts in defining the scope of good faith bargaining and applying the same, or similar, standards to "meet and confer" laws within their states.

If parties to public sector negotiations have the obligation to negotiate in good faith, and state courts are applying the NLRB and federal court rulings to their decisions, then the private sector cases and issues reviewed above may be made applicable to the public sector negotiating process. Thus, the standards of surface versus hard versus reasonable bargaining have application to public sector negotiations and the indicators of good faith negotiations reviewed earlier can be used in determining the intent of the parties to bargain in good faith.

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35. *Id.* at 811.
36. NEA-Shawnee Mission v. Board of Educ., 512 P.2d 426 (Kan. 1973).

The issue of providing information both in substantiation of proposals and counterproposals, and in the performance of administration of the contract, warrants our attention. In California and Connecticut, meet and confer type negotiations laws are in effect with the employees' representative prohibited from bringing concerted economic pressure (a strike) against the employer to effect a solution. In addition, in each state, the provision for binding arbitration is missing, with only written recommendations of an advisory nature used to resolve impasse situations.

In *NLRB v. Leland Stanford Junior University,* the Ninth Circuit applied the findings of *Detroit Edison Co. v. NLRB,* with additional federal court rulings *(General Electric Co. v. NLRB, P. R. Mallory & Co. v. NLRB,* and *NLRB v. Acme Industrial Co.),* in rendering its decision for the employees' representative regarding the need for the employer to provide information to the union relevant to the collective bargaining duties of the union.[37] In addition, the court found that a broad test is applied to determine the extent, and relevance, of the information needed. In this case, the information sought dealt with non-union employees and the burden of proof of the relevance of the information was placed squarely on the shoulders of the union.

Using the discovery-type standard enunciated in *Acme Industrial* and applying the standard established in the *San Diego Newspaper Guild* case, the court held that the union must show how the information would be useful in collective negotiations and not be just a whimsical notion on its part.[38] Yet the court did not require a burdensome showing which would defeat the liberal discovery standard of relevancy. Hence the solution appears to be to require the union to produce an initial, but not overwhelming, set of evidence to demonstrate the relevancy of the information. Thus, the stage is set for boards of education to provide information demonstrating that they are meeting the good faith standard of negotiations.

The need to provide information to the union so that it may negotiate in good faith has been established. With *West Hartford Bd. of Ed. v. State Bd. of Labor,* the Supreme Court of Connecticut announced the expansion of good faith obligations on the part of the board to include the provision of information to the union in its efforts to administer and police the contract.[39] The court found that

37. NLRB v. Leland Stanford Junior Univ., 715 F.2d 473 (9th Cir. 1983). *See also* Detroit Edison Co. v. NLRB 440 U.S. 301 (1979); General Electric Co. v. NLRB, 446 F.2d 1177, (6th Cir. 1972); P. R. Mallory & Co. v. NLRB, 411 F.2d 948 (7th Cir. 1969) *rehearing denied* July, 1969; and NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

38. San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977).

39. West Hartford Bd. of Educ. v. State Board of Labor, 460 A.2d 1255 (Conn. 1983).

the state statute for public sector negotiations was essentially patterned after the NLRA and thus the court reasoned it could utilize the federal judicial interpretation of the Act in reaching its decision. The court relied on the *Detroit Edison Co., Acme Industrial,* and *Truitt* decisions to hold that the school board must provide relevant information needed by the representative for the proper performance of his duties including administration and policing of the contract.

Thus, we see that, not only are the courts willing to follow federal court decisions and make them applicable to public sector situations, they are willing to apply the standards found in private sector negotiations to public sector negotiations, including those situations under "meet and confer" laws.

Good Faith and Impasse

While the public sector employer must follow the dictates of good faith negotiations, he also has an obligation to maintain services and provide for the education of the students within the district. Therefore, states have provided public employee negotiations laws with impasse procedures which, when followed and completed, permit boards of education to take action to institute necessary steps to continue services they are to provide. Specifically then, what are the obligations of the public sector employer to the employees regarding good faith negotiations and where do unilateral actions mesh with good faith negotiations?

It has been held that public employers, like their private sector counterparts, are not free to unilaterally change the conditions of employment during the life of a valid contract.[40] This includes the continuance of past practices that the board considered to be a managerial right. In this instant case, the state court held that the policy mandating physical examinations, and the past practice of reimbursement for the cost of those examinations, was a mandatorily negotiable item and, even in the absence of a contract provision on which to base its action, the board had overstepped its bounds by unilaterally withdrawing the reimbursement.

However, the Alaska Supreme Court distinguished between mandatory and permissive items of negotiations in permitting the University of Alaska to unilaterally change work rules that affected the working conditions of employees.[41] The finding of no bad faith negotiations, or of an unfair labor practice, occurred as the strict reading

40. BOCES v. New York Pub. Employment Rels. Board, 82 A.D.2d 691 (N.Y. 1981).
41. Alaska Commun. College Teachers v. University of Alaska, 669 P.2d 1299 (Alaska 1983).

of the statute found that only salary, fringe benefits, number of hours worked, and amount of leave time were mandatorily negotiable items. Thus, the work rules, being permissive items of negotiations, could be unilaterally changed.

The court also examined the issue of hard versus surface bargaining regarding the failure on the part of the board of regents to ratify the tentative contract. This had been a ground rule within the negotiations process and, when the board failed to ratify the tentative agreement, the employees' representative charged bad faith. In looking at the specifics of the situation, the court found that the failure to ratify was due to the new president who, entering the process after the tentative agreement had been reached, advised against ratification. The court ruled that this was not a bad-faith tactic meant to forestall the negotiating process or to evidence surface bargaining.

Consideration has been given to unilateral changes in working conditions and the implications of good faith negotiations in Maine. Maine's "meet and confer" law was applied to the actions of the Board of Directors of Maine School Administrative District No. 8.[42] Here the state court found that the board had violated its good faith responsibilities by changing the terms and conditions of employment unilaterally after the expiration of the contract, but prior to the exhaustion of impasse procedures. Holding that the board had overstepped its bounds, the court held that an employer may not unilaterally alter the terms and conditions of employment after the expiration of a contract. This rule, the court held, was based on the principle that unilateral changes of the contract are in "contravention of the duty to bargain in good faith."

In a footnote to that opinion, the court indicated that the generally accepted exceptions to this rule included: (1) impasse, (2) union waiver of its right to insist on negotiating over the alteration, and (3) changes required by law.[43]

Reaching impasse appears to be a turning point on which employers may make the changes necessary to continue the operation of the schools. In the *Modesto* decision, the court examined the extent to which unilateral changes could be made following the existence of impasse conditions.[44] While holding that unilateral changes were illegal and signs of bad-faith negotiations, where the public employer had failed to notify and negotiate with the exclusive representative

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42. Lane v. Board of Directors of Maine School Administrative Dist. No. 8, 447 A.2d 806 (Me. 1982).

43. *Id.* at 810

44. Public Employment Rels. Bd. v. Modesto City Schools Dist., 186 Cal. Rptr. 634 (Cal. Ct. App. 1982).

of the employees, and where the changes had occurred prior to reaching impasse, the court declared that upon reaching impasse the school board could make the changes it desired, but within certain limits.

Following the rulings in *Katz* and the *American Federation of Television and Radio Artists,* the California court held that, after impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. The offer need not be identical to the last offer, but must be reasonably close to the pre-impasse proposal. This includes the last offer, but no more than the last offer. Thus, the standards of good faith apply even in impasse situations and the indications of federal courts as to the practices applicable within the private sector provide guidance to the public sector employers.

One last issue is raised about public school impasse conditions. In addition to not issuing unilateral changes that exceed the last offer of the employer as indicated above, the Indiana Supreme Court examined the meaning of "status quo" as it applied to negotiations where no contract for the succeeding year had been reached.[45]

The state statute provided that, in the absence of an agreement 14 days prior to the budget submission date, the parties had to maintain the status quo and the employer could issue tentative contracts and submit a budget based on the existing terms and conditions of employment. The school board, failing to reach a successor agreement for the 1978-1979 school year, issued payroll checks in the amount of the salary teachers had received during the 1977-1978 contract. The association contended that this was a unilateral change from past practice and a failure to maintain the status quo that would have provided for movement of individual teacher salaries up one "step," and where applicable, from one "lane" to the next, in accordance with the existing, uncontested contract.

The court ruled that "status quo" was to be defined as the "existing state of things at any given date . . . the actual, peaceable, uncontested status which preceded the pending controversy."[46] This definition, combined with evidence of past practice of movement of individual teacher salaries across "steps" and "lanes" as appropriate, led the court to hold for the association and found the school board in violation of good-faith negotiations; the issuance of 1977-1978 salaries without movement was viewed as a means to coerce the association to a settlement. Thus, the stage is set for the continuance of

45. Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n., 456 N.E.2d 709 (Ind. 1983).

46. *Id.* at 712.

benefits and salaries, including increases in accord with the last existing contract, even during a period of impasse.

Summary

In reviewing the foregoing discussion of good faith requirements under "meet and confer" laws for public sector negotiations, there are implications to be drawn and applied to school district management decisions regarding negotiations.

First, it appears that state courts have taken the opportunity in rendering their decisions to examine NLRB and federal court rulings that pertain to the private sector. While this has meaning for the rulings of the state courts, it also causes private sector negotiating strategies and reasoning to be applied to public sector negotiations. The message for school boards of education, as well as private negotiators and attorneys who advise these boards, is for their need to keep abreast of both public and private sector rulings.

Second, with the rulings that apply NLRA provisions to public schools, boards must be cognizant of their activities and strategies within the context of good-faith negotiations. While they need not agree to any specific proposal or make a concession, boards need to provide ample evidence that they are reasonable in their positions, even if it is a matter of hard bargaining. Anything that gives the appearance of surface bargaining, or merely going through the motions to satisfy the statutory requirements so that the boards can reach impasse and make unilateral changes, will be suspect and challenged and may well lead to a finding of bad-faith negotiations. To maintain a position of hard bargaining is permissible, contingent on demonstrating that every effort is being made to reach an agreement and that the position is not one of "take it or leave it."

Third, indications from both private and public sector rulings of what constitutes good faith have been expanded beyond the initial NLRA statutory requirement. These now include the need to provide information to substantiate proposals, counterproposals, and claims by management, as well as providing information to employee representatives to permit the fulfillment of responsibilities to administer and police the contract. The intent here is to provide the basis for reasonableness of proposals by the employee representative relative to the exact financial conditions and status of the employer. Such information may include items of the status of both union and nonunion members where the information has been shown initially to be relevant to the negotiating process.

Regarding the withdrawal of proposals tentatively agreed upon, in the private sector this is a violation of good faith negotiations absent

good cause to the contrary. In public sector negotiations, while the same holds true, there is an additional prospect for withdrawal of tentatively agreed-upon proposals. This, as indicated in the *Alaska Community College* case, means where a ground rule has been accepted by both sides that includes the ratification by the full board or membership of the union, failure to ratify would be good cause for withdrawal. In addition, the specter of bad faith raised here is the amount of authority given the negotiators to make and accept proposals that would be binding on the board.

As seen in the cases reviewed, stalling tactics by unexplained delays and postponement, sending negotiators to the table with no authority to do more than argue and listen, and breaking commitments made by company representatives, are all indications of a lack of good-faith negotiations. Again, caution is needed on the part of public school management to provide evidence of the reasonableness of its position in establishing its good faith in negotiations. Further, as indicated by private sector decisions, the withdrawal of a proposal once made must be explicitly accomplished and may be accepted if not withdrawn.

In dealing with impasse and unilateral changes in employment conditions, we began by reviewing the *Riley County* case dealing with unilateral changes following the completion of impasse procedures as they might lead to suspicions of surface bargaining. While the *Riley* decision currently holds in Kansas, decisions of other state courts have yielded different conditions regarding the imposition of unilateral contract changes. These include the issuance of contracts containing terms that do not exceed the last offer rejected by the employee representative, or at least a close approximation of that offer. Further, the need for the firm establishment of impasse, reached via good-faith negotiations on the part of both parties, is necessary to warrant unilateral action on the part of the board.

On balance, the efforts by the courts to provide the atmosphere for good faith negotiations via application of private sector standards to the public sector is a trend worth watching for those who negotiate in this arena.